Supreme Court, U.S.
FILED
JAN 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-735

In the Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL E. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOE R. LAMPORT
Col., OJAG, USAF
ROBERT E. GIOVAGNONI
Col., OJAG, USAF
TERRY M. PETRIE
Maj., OJAG, USAF
Appellate Government Counsel
Government Trial and Appellate Division
Headquarters, United States Air Force
Bolling Air Force Base
Washington, D.C. 20332-6128

17 pp

QUESTION PRESENTED

Whether petitioner made an adequate factual showing that an expert toxicologist consultant was necessary to his defense that he did not use cocaine.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Ake v. *Oklahoma*, 470 U.S. 68 (1985) 7, 8, 9, 10
Caldwell v. *Mississippi*, 472 U.S. 320 (1985) 12
McKinley v. *Smith*, 838 F.2d 1524 (11th Cir. 1988) 9
Moore v. *Kemp*, 809 F.2d 702 (11th Cir.), cert. denied, 481 U.S. 1054 (1987) 10, 12
Stephens v. *Kemp*, 846 F.2d 642 (11th Cir.), cert. denied, 109 S. Ct. 189 (1988) 9, 10, 12
United States v. *Fontenot*, 26 M.J. 559 (A.C.M.R. 1988), pet. granted, 27 M.J. 460 (1988), 28 M.J. 262 (1989) 12
United States v. *Garries*, 22 M.J. 288 (C.M.A.), cert. denied, 479 U.S. 985 (1986) 9
United States v. *Harper*, 22 M.J. 157 (C.M.A 1986) 3
United States v. *Mustafa*, 22 M.J. 165 (C.M.A. 1986), cert. denied, 479 U.S. 953 (1986) 9
United States v. *Murphy*, 23 M.J. 310 (C.M.A. 1987) 3
United States v. *Toledo*, 25 M.J. 270 (C.M.A. 1987) 9
United States v. *Tornowski*, 29 M.J. 578 (A.F.C.M.R. 1989) 12

Constitution, statutes, and rules:

U.S. Const. Amend. V (Due Process Clause) ... 7

Constitution, statutes, and rules—Continued:	Page
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:	
Art. 46, 10 U.S.C. 846	9
Art. 67(d), 10 U.S.C. 867(d)	8
Art. 67(h)(1), 10 U.S.C. 867(h)(1)	7, 8
Art. 112a, 10 U.S.C. 912a	2
28 U.S.C. 1259(3) (Supp. V 1987)	7
Mil. R. Evid. 702	9
Rules for Courts-Martial 703(d)	2, 9
Miscellaneous:	
Manual for Courts-Martial, United States—1984	2, 9

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-735

MICHAEL E. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 7a-11a) is reported at 28 M.J. 484. The opinion of the Air Force Court of Military Review (Pet. App. 1a-6a) is not yet officially reported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 8, 1989. The petition for a writ of certiorari was filed on November 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1987).

STATEMENT

Petitioner, a member of the United States Air Force, was tried by a general court-martial at McGuire Air Force Base

in New Jersey. He was convicted of the wrongful use of cocaine, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a. He was sentenced to confinement for nine months, a bad conduct discharge, forfeiture of $150 pay for nine months, and a reduction in rank. The convening authority approved the findings, reduced the forfeiture to $150 for one month, and otherwise approved the sentence. The Air Force Court of Military Review affirmed the findings and sentence. The Court of Military Appeals limited its discretionary review to one question and affirmed.[1]

1. On January 9, 1987, petitioner and other members of his unit provided urine samples at McGuire Air Force Base for a random urinalysis test. Tr. 140-141, 271. The samples were sent by registered mail to the Air Force drug detection laboratory at Brooks Air Force Base in Texas. Tr. 153-154. Tests at the Brooks laboratory and follow-up tests at the Center for Human Toxicology, a civilian laboratory, disclosed the presence of the cocaine metabolite in petitioner's urine. Tr. 186, 195; PXs 4, 5. On April 30, petitioner was charged with the wrongful use of cocaine.

2. On August 26, petitioner asked the convening authority to appoint a Dr. John Whiting, a civilian forensic expert, as an expert consultant for the defense at government expense pursuant to Rule for Courts-Martial 703(d), *Manual for Courts-Martial, United States – 1984* (*Manual*). AX 3 Attachment 1. In his request, petitioner stated that "[t]he government evidence in [the] case consists of scientific radioimmunoassay, gas chromotagraphy, and mass spectrometry test results." *Ibid.* Petitioner claimed that he needed Dr. Whiting as a defense consultant because "[t]he

---

[1] The Court of Military Appeals limited its review to the question whether petitioner was prejudiced by an instruction given by the trial judge to the court-martial panel. Pet. App. 8a.

reliability of these testing procedures as well as the accuracy of the results are material issues. Without the assistance of an expert trained in these scientific procedures, the defense cannot adequately prepare to litigate these issues." *Ibid.* The convening authority denied petitioner's request without comment on September 9. AX 3; Pet. App. 2a.

Before trial, the defense filed another motion asking to have Dr. Whiting appointed as an expert defense consultant. Tr. 20; AX 3. Petitioner noted that the government intended to call Dr. Naresh Jain, a civilian forensic toxicologist, to testify at trial about the urinalysis testing procedures.[2] Petitioner asked for Dr. Whiting in order to obtain "his expert review of the forensic validity of Brooks and Center for Human Toxicology Standing Operating Procedures," and to "consult[ ] with defense counsel in the interview and cross examination of prosecution expert witnesses." AX 3, at 1. Expert assistance was necessary for the defense, petitioner claimed, because defense counsel did not "hold degrees or [have] scientific training in forensic toxicology." *Ibid.* See also *id.* at 2. Petitioner said that he had contacted Dr. Whiting and that Dr. Whiting could be available to testify at trial. *Id.* at 1.

The trial judge held a hearing on the motion, at which Dr. Jain testified. Dr. Jain said that he did not test petitioner's urine sample and that he was retained by the government to testify about the chain of custody, the integrity of petitioner's sample, and the urinalysis test procedures used to determine whether there was evidence of drug use. Dr. Jain also said that he was available to consult with the defense, and that he would inform the defense of any

[2] In a military prosecution for the wrongful use of drugs based on the results of a urinalysis test, the government must use expert testimony to explain the laboratory test results. *United States* v. *Murphy*, 23 M.J. 310 (C.M.A. 1987); *United States* v. *Harper*, 22 M.J. 157 (C.M.A. 1986).

irregularities in the test procedures and that he had done so in other cases in the past. He noted that, based on his study of the matter, he would testify that the urinalysis procedures used in this case were forensically valid. Dr. Jain testified on cross-examination that some other experts, including Dr. Whiting, might prefer to use a testing method other than those used in this case, but that no expert in the field would criticize the testing procedure used in this case as being inaccurate. Tr. 21-43.

Dr. Jain explained that the gas chromotagraphy/mass spectrometry urinalysis test could use either the chemical ionization testing method or the electron impact testing method. Dr. Jain testified that he knew of at most three experts, including Dr. Whiting, who preferred the electron impact test, which was not performed on petitioner's urine sample, to the chemical ionization procedure, which was used to test petitioner's urine. At the same time, according to Dr. Jain, those experts would not say that the chemical ionization procedure used in this case was inaccurate. In fact, Dr. Jain testified that no expert had ever criticized the chemical ionization procedure as being inaccurate. Tr. 34-37. The chemical ionization test procedure had been used for ten years on thousands of samples, and the results from that procedure had always been corroborated by other procedures, including the electron impact test method. In Dr. Jain's words, "[n]ot a single scientist in this world has published any information saying that chemical ionization can result in erroneous answers." Tr. 41. Dr. Jain said that the chemical ionization method was sensitive to very small samples, but that the equipment involved in that procedure was the "most expensive" available. *Ibid.* Dr. Jain added that another test, the radioimmunoassay test, was also performed on petitioner's urine sample. *Ibid.*

After the hearing, the defense reiterated its claim that it was entitled to an expert consultant, because defense counsel

had no training in forensic toxicology, even though the defense at trial would be that petitioner had never used cocaine. Tr. 44.[3]

The trial judge denied the motion and made detailed findings of fact and conclusions of law. Tr. 53-56, 66; AX 5. The judge found, inter alia, that defense counsel's questions of Dr. Jain during the hearing reflected "a most impressive base of knowledge of and familiarity with the procedures used in performing urinalysis, including the calibration of the equipment," that defense counsel "is obviously knowledgeable of the [urinalysis testing] methods other than those used by [the Department of Defense]," and that defense counsel had prior experience in urinalysis cases, including at "least one prior case where Dr. Jain was the expert witness." Tr. 55. The court also concluded that "the science or technology involved in this case is not the issue," *ibid.*, and that "[t]he real issues" were whether the tested urine sample came from petitioner and whether the laboratories followed proper procedures during their tests. Tr. 56. "Those issues do not impact the reliability of the underlying science involved. Neither does the availability of tests other than the one employed." *Ibid.* Concluding that "there has not been a demonstrated need for a consultant from outside government resources," the judge denied the defense request to have Dr. Whiting appointed as a defense expert at government expense. *Ibid.* After unsuccessfully attempting to find a government expert who could serve

---

[3] In response to a question from the bench whether the defense was seeking a consultant or a witness, the defense replied, "A consultant, your Honor, except in the event that the doctor testifies to something on direct examination which I haven't heard yet, I will then have a rebuttal witness who can testify in rebuttal to the government's case in chief." Tr. 44. See also Tr. 69-70.

as a defense consultant,[4] the trial judge ruled that Dr. Jain was an adequate substitute because he was not "biased," nor did he "favor[ ] any side." Tr. 76.

Dr. Jain testified during the government's case-in-chief. Defense counsel conducted an extensive cross-examination, Tr. 198-225, 227-229, 237-238, and did not renew the request for an expert consultant at the completion of Dr. Jain's testimony or at the close of the government's case-in-chief, Tr. 238-239. Petitioner subsequently testified in his defense at trial. He denied using cocaine, but he offered no explanation for the presence of the cocaine metabolite in his urine sample. Tr. 277-281.

3. The Air Force Court of Military Review affirmed. Pet. App. 1a-6a. It rejected petitioner's claim that the trial

---

[4] Before ruling on the motion, the trial judge directed the government to determine whether there were any expert military personnel available to substitute for Dr. Whiting. Tr. 48. The prosecutor made an inquiry, and after the judge made his ruling the prosecutor indicated that he was trying to determine whether other experts were available. Tr. 57-58. Defense counsel suggested that the prosecutor should ask the convening authority whether Dr. Whiting should be appointed. Tr. 58-59. The trial was recessed while the prosecutor checked with the convening authority about Dr. Whiting. Tr. 59. When the trial reconvened, the prosecutor said that two persons at the Brooks laboratory were available for the defense. The defense objected to their use on the ground that they suffered from a conflict of interest, because they had conducted the tests on petitioner's urine sample. Tr. 59-61. Regarding Dr. Whiting, the government said that the convening authority was not available, but that the staff judge advocate would recommend that the request be denied and that the government would offer Dr. Jain as an adequate substitute. Tr. 62. Defense counsel did not consider Dr. Jain to be an adequate substitute and wanted the consultant to be able to serve as a potential defense witness. Tr. 67-68. Relying on his earlier findings, the trial judge found that the government had made "an earnest search" for a government expert, Tr. 67, and denied trial defense counsel's request for a military expert consultant, holding that Dr. Jain was an adequate substitute. Tr. 72, 76.

court erred by denying the defense request for an expert consultant. *Id.* at 4a-5a. The court found that petitioner's "requests for an expert consultant did not state specifically, or even generally, in just what capacity such expert would be utilized," *id.* at 4a, and the court concluded that the defense request was "predicated" on the belief that an expert "would be nice to have in the event that something developed" before or during trial, *id.* at 4a-5a. The court also held that, in light of defense counsel's knowledge of the urinalysis testing processes (as shown by his cross-examination of Dr. Jain), the denial of the requested consultant did not prejudice petitioner. *Id.* at 5a.

4. Petitioner then sought review in the Court of Military Appeals. Petitioner raised in his petition seeking review before that court the question whether he was entitled to a expert consultant at trial, but the Court of Military Appeals declined to grant review on that question. Instead, that court limited its grant of review to the the validity of an instruction, Pet App. 8a, and found that the instruction was not plain error, *id.* at 8a-11a.

ARGUMENT

Petitioner contends that the trial judge denied him access to a qualified expert consultant in violation of the Due Process Clause and this Court's decision in *Ake* v. *Oklahoma*, 470 U.S. 68 (1985). That claim lacks merit. Petitioner did not make a sufficient showing that an expert consultant was necessary for his defense. The trial judge therefore did not err in denying petitioner's application to have a private consultant appointed at government expense.[5]

---

[5] It is also not clear that the question presented in the certiorari petition is subject to review in this Court. The statutes authorizing this Court to review by a writ of certiorari the judgments of the Court of Military Appeals, 28 U.S.C. 1259(3) (Supp. V 1987) and 10 U.S.C. 867(h)(1),

In *Ake* v. *Oklahoma*, this Court held that when an indigent defendant demonstrates to the trial judge that his sanity at the time of the crime is to be a significant factor at his trial, the State must provide the defendant with access to a competent psychiatrist who will conduct an appropriate examination and assist in the preparation and presentation of the defense. 470 U.S. at 83. The rationale underlying the decision in *Ake* was that psychiatric evidence can be so important in a case that turns on the defendant's mental state that the assistance of a psychiatrist may be crucial to the defendant's ability to marshal a defense. *Id.* at 80. Without such assistance, an indigent defendant may be so disabled from mounting an effective defense that "the risk of an inaccurate resolution of sanity issues is extremely high." *Id.* at 82.

The military justice system has faithfully applied the principles of *Ake*. As the court of military review explained, Pet. App. 4a, under military law a servicemember accused of a crime has an equal opportunity to obtain expert assistance, even on questions other than a defendant's sanity

---

restrict this Court's certiorari jurisdiction to "decisions" of the Court of Military Appeals. Section 867(h)(1) further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory right, which it exercised in this case, to limit its decision in any case to less than all of the issues urged by a defendant. 10 U.S.C. 867(d). Since the Court of Military Appeals accepted for review only an instructional issue and did not grant review on the question presented in the certiorari petition, there is a question whether that court rendered a "decision[ ]" on the question that petitioner has presented in his petition, and whether the court's refusal to accept that question constituted an "action" of that court "in refusing to grant a petition for review" within the meaning of 10 U.S.C. 867(h)(1). Those issues do not require an answer in this case, however, since the question presented in the certiorari petition does not warrant review by this Court in any event.

at the time of the crime, if he can show why such assistance is relevant and necessary to a significant issue in his case. See, *e.g.*, *United States* v. *Toledo*, 25 M.J. 270, 276 (C.M.A. 1987); *United States* v. *Garries*, 22 M.J. 288, 290 (C.M.A. 1986), cert. denied, 479 U.S. 985 (1986); *United States* v. *Mustafa*, 22 M.J. 165, 168-169 (C.M.A.), cert. denied, 479 U.S. 953 (1986); Art. 46, UCMJ, 10 U.S.C. 846; Rule 703(d), Rules for Courts-Martial; Mil. R. Evid. 702, *Manual*. Compare *Ake*, 470 U.S. at 83. Indeed, the military courts have taken *Ake* considerably farther than this Court, since they have held that the principles of *Ake* are applicable even in the absence of any proof of indigency on the part of the accused. See *United States* v. *Mustafa*, 22 M.J. at 168-169.

Contrary to his claim, petitioner was not denied any relief to which he was entitled under *Ake*. Unlike the defendant in *Ake*, who was denied the assistance of an independent psychiatrist, petitioner had the benefit of an independent toxicological examination of his urine sample by a neutral civilian laboratory, the Center for Human Toxicology.[6] To be sure, that laboratory confirmed the presence of the cocaine metabolite in petitioner's urine, and that finding did not support petitioner's claim of innocence. But *Ake* does not guarantee a defendant the assistance of an expert who will reach a conclusion that pleases the defendant. *Ake*

---

[6] The trial judge also appointed Dr. Jain to assist the defense after finding that he was not a partisan witness. In some cases, the assistance required by *Ake* can be satisfied by the appointment of a government expert to help the defense understand complex scientific evidence. That is particularly true when the field in question is less subject to the type of uncertainty that is characteristic of psychiatry, the subject matter involved in *Ake*. See *Stephens* v. *Kemp*, 846 F.2d 642, 650 (11th Cir.) (ballistics expert), cert. denied, 109 S. Ct. 189 (1988); *McKinley* v. *Smith*, 838 F.2d 1524, 1530 (11th Cir. 1988) (pathologist). Urinalysis testing would also appear to be one of those areas.

guarantees only that an indigent defendant in a case raising a serious issue as to which expert assistance is necessary have access to a competent expert "who [is] not beholden to the prosecution," 470 U.S. at 83, 85, to conduct any necessary examinations and assist the defense. The government has no obligation to supply the defendant with a series of experts until the accused finds one who will support his defense. *Id.* at 79, 83.

Petitioner claims that an independent defense expert is necessary since the only defense that a servicemember can present when charged with narcotics use based on a urinalysis test is a defense that challenges "the urinalysis results" or the "validity of an urinalysis," and that the assistance of an expert toxicologist is crucial to such a defense. Pet. 7.[7] That contention is flawed in several respects. In the first place, a defendant can always try to show that, due to a flaw in the chain of custody or a mistake in the laboratory procedures used in his case, a positive urinalysis test result cannot fairly be attributed to drug use. Neither defense requires the assistance of a toxicologist. An attorney is well equipped to challenge the government's proof that the tested urine sample is the one taken from

---

[7] At trial, petitioner also claimed that expert assistance was necessary because defense counsel lacked any training in forensic toxicology. Petitioner has not renewed that claim in this Court, and it lacks merit in any event. Defense counsel has the obligation to educate himself about the relevant scientific field in order to show that expert assistance is necessary to the defense. *Stephens* v. *Kemp*, 846 F.2d at 646-647; *Moore* v. *Kemp*, 809 F.2d 702, 712 (11th Cir.) (en banc), cert. denied, 481 U.S. 1054 (1987). What is more, as the record shows and as the trial judge colorfully put it, defense counsel was "no rookie to urinalysis cases." Tr. 44. The court of military review found that defense counsel's cross-examination of Dr. Jain revealed that counsel had "much more than a rudimentary understanding [of] the processes used in urinalysis testing and in interpreting the technical test results." Pet. App. 5a.

the defendant, or to question whether a laboratory followed the correct procedures in testing the defendant's sample. Moreover, a defendant who believes that a positive urinalysis result is due to his unknowing ingestion of a substance that turned out to contain narcotics can so testify at trial, with or without supporting character witnesses, but certainly without the need for a defense toxicologist.

Petitioner asserts that it is "[c]ommon knowledge among military judge advocates" that "there are several qualified experts that question the validity of the Department of Defense (DOD) urinalysis testing program, especially when testing for cocaine." Pet. 7. A defense toxicologist is therefore necessary, petitioner argues, in order to mount an attack on the ability of the DOD urinalysis procedures to detect the cocaine metabolite in urine. In particular, petitioner asserts that Dr. Whiting would have supported that claim, and that the trial court thus erred in denying his request to have Dr. Whiting made a defense expert.

Petitioner, however, failed to make the necessary factual showing to support such a claim in the trial court. Petitioner asserted that the reliability of the urinalysis testing procedures and the accuracy of the test results would be material issues in his case, but he proffered no factual support whatever for those assertions in his request to the convening authority, in his pretrial motion, or at the pretrial hearing. The only evidence presented at the pretrial hearing on this issue came from Dr. Jain, and far from supporting petitioner's claim, Dr. Jain's testimony undermined it. Dr. Jain said that although Dr. Whiting preferred a different test from the one used in petitioner's case, Dr. Whiting would not say that the test used in petitioner's case was unreliable. Moreover, petitioner did not make a proffer of any contrary testimony that he expected Dr. Whiting to provide, even though petitioner had contacted Dr. Whiting nearly two months before trial, AX 3 Attachment 1, nor did peti-

tioner cite any scientific journal or literature of any type that would support his claim.[8] (In fact, petitioner has cited no such material in his certiorari petition.) Under these circumstances, there is no merit to petitioner's claim that Dr. Whiting's assistance or testimony would have supported his innocence.

In sum, petitioner failed to carry his burden under *Ake*. If the reliability of the urinalysis tests performed by the Brooks laboratory and the Center for Human Toxicology was a significant issue in the case, it was incumbent upon petitioner to spell out that claim. Since petitioner offered nothing more than the vague and unsubstantiated assertion that the urinalysis procedures were unreliable, the trial court did not err by declining to appoint Dr. Whiting as a defense expert. See, *e.g.*, *Caldwell* v. *Mississippi*, 472 U.S. 320, 323 n.1 (1985); *Stephens* v. *Kemp*, 846 F.2d 642, 646-650 (11th Cir.), cert. denied, 109 S. Ct. 189 (1988); *Moore* v. *Kemp*, 809 F.2d 702, 712 (11th Cir. 1987) (en banc), cert. denied, 481 U.S. 1054 (1987); *United States* v. *Tornowski*, 29 M.J. 578, 581 (A.F.C.M.R. 1989); *United States* v. *Fontenot*, 26 M.J. 559, 562 (A.C.M.R.), pet. granted other grounds, 27 M.J. 460 (1988), hearing held, 28 M.J. 262 (1989).

---

[8] Petitioner had ample opportunity to make that showing. Petitioner knew almost two months before trial that the government intended to call Dr. Jain as a witness, see Tr. 2; AX 3; the government made discovery materials, including the laboratory procedures and results, known to the defense before trial, see Tr. 64; the government made Dr. Jain available to the defense before the pretrial hearing, see Tr. 23, 74; and defense counsel conceded that he had an adequate opportunity to review the laboratory procedures and results and to discuss them with Dr. Jain before the hearing, Tr. 74. A liberal discovery policy, like the one used in the military justice system, helps to show that petitioner had the tools to explain why a defense expert was necessary for his case. See *Moore* v. *Kemp*, 809 F.2d at 712 n.10.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOE R. LAMPORT
Col., OJAG, USAF
ROBERT E. GIOVAGNONI
Col., OJAG, USAF
TERRY M. PETRIE
Maj., OJAG, USAF
Appellate Government Counsel
Government Trial and
Appellate Division

JANUARY 1990

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00695